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PROCEEDINGS FOUNDED ON UNCERTIFIED ADJUSTMENTS OF DECREES.

Quite recently, in *Hansa* v. *Bhawa* [1], Sir Basil Scott, C. J. and Heaton, J. held that the court should not 'allow a clear case of fraud to be covered and condoned by the provisions of O. 21 R. 2 of the Civil Procedure Code' and they accordingly allowed an uncertified payment to be pleaded *in bar of execution*, thus going even further than *Ramayyar* v. *Ramayyar* [2]. In his anxiety to save 'the reputation of our courts,' Heaton, J. in *Trimbak Ramakrishna* v. *Hari Laxman* [3], broadly laid down that the last clause of S. 258 (now O. 21 R. 2) only enacted a *presumption* and did not preclude a judgment-debtor from proving the prior uncertified payment or adjustment which the decree-holder fraudulently ignored. The Punjab Chief Court still appears to adhere to the view (taken by Banerjee, J. in *Azizan* v. *Matuk Lal Sahu* [4]) that though the uncertified payment or adjustment cannot directly be pleaded in bar of the execution, the judgment-debtor may *in a separate suit* obtain a declaration that the decree has been satisfied and hence cannot be executed (See *Mussammat Jamna* v. *Beli Ram* [5], *Jamun Ram* v. *Kishen Ram* [6]). Much as we sympathise with these attempts to obviate the injustice arising from a literal application of O. 21 R. 2, we must recognise that the preponderance of authority is in favour of the view that however reprehensible may be the decree-holder's conduct in executing the decree in spite of the prior uncertified payment or adjustment, such payment or adjustment cannot directly or indirectly be relied on to prevent execution. The only remedy allowed to the judgment-debtor in such a case is to claim compensation; but though his right to maintain a suit for the purpose has long been recognised, the precise basis on which the claim rests has not even yet been clearly defined, and this accounts for the uncertainty attending the decision of the two principal questions

1. (1915) 18 Bom. L.R. 92.
2. (1897) I. L. R. 21 M. 356.
3. (1910) I. L. R. 34 B. 575.
4. (1893) I. L. R. 21 C. 437.
5. (1913) 21 I. C. 557.
6. (1914) 42 P. R. 1914=25 I. C. 642.

arising in connection with such suits, *viz.*, when and under what circumstances can the judgment-debtor maintain such a suit and (ii) what is the rule of limitation governing it. Thus in *Sriramulu* v. *Dalayya* [1], it was held by Benson and Moore, JJ. that a mere application for execution, ignoring the prior adjustment, did not give the judgment-debtor a cause of action for recovery of the sum originally paid and *Deno Bundhu Nundy* v. *Hari Mati Dassee* [2] inclines to the same view. But in *In re Medaikal-liani, Anni* [3]. Mr. Justice Subramanya Aiyar was of a different opinion. And on the question of limitation, the decision in *Marappa Chetti* v. *Shunmugappa Chetti* [4], creates more difficulties than it helps to solve. It seems therefore desirable to examine the true nature and basis of the claim for compensation in such cases.

The question was raised in one of the earliest cases on the point—but unfortunately it has not even yet been clearly answered —whether, when the judgment-debtor has been compelled to pay a second time *i. e.*, by process of execution, he should seek to recover the first (uncertified) payment or the second, (*Arunachella* v. *Appavu* [5]). Scotland, C. J. and Holloway and Collett, JJ. thought that the first payment was rightful and the claim if any should be for the second. Innes, J. was for somehow allowing an action, and did not feel quite certain as to the ground. Holloway, J. seems to have felt that the principle of *Marriot* v. *Hampton* [6], would be a bar to the recovery, but the other Judges held that it was distinguishable. When the matter came up before a Full Bench of the Calcutta High Court *Goono Monee Dosse* v. *Pran Kishore Dosse* [7], Couch C.J. preferred to deal with the case as one to recover the amount *originally* paid (so as to steer clear of *Marriott* v. *Hampton* [6]) and Mitter, J. also appears to have been of the same view. The Full Bench in *Vira Raghava* v. *Subbakka* [8], had to deal with a suit to recover the first payment, but the Court seems to have sustained the suit as one for damages generally. In *Haji Abdul Rahiman* v. *Khoja Khaki Aruth* [9], the question was incidentally discussed by the Bombay High Court and both West and Farran, JJ. would seem to regard

1. (1905) 16 M. L. J. 54. 2. (1903) I. L. R. 31 C 480.
3. (1907) I. L. R. 30 M. 545. 4. (1911) 21 M L. J. 518.
5. (1866) 3 M.H.C.R. 188. 6. (1797) 2 Sm. L.C. 421; 7 T.R. 269=101 E.R. 969.
7. (1870) 13 W. R. F. B. 69. 8. (1881) I. L. R. 5 M. 397.
9. (1886) I. L. R. 11 B 6.

the judgment-debtor's remedy as one to recover the sum originally paid. And likewise, the Allahabad Court (see *Shadi* v. *Ganga Sahai* [1]). But the decision in *Marappa Chetti* v. *Shunmugappa Chetti* [2], suggests that there may be two kinds of suits, one based on the first payment, the other, arising out of the second.

As to the *legal basis* of the judgment-debtor's suit, Scotland, C. J. in *Arunachella* v. *Appavu* [3] rested the right to relief on the ground that in taking out execution, in spite of the prior adjustment, the decree-holder committed a gross fraud and that the debtor was in equity and good conscience entitled to recover the sum so levied. Innes, J., is indecisive. According to him, the claim is 'for recovery of neither the former nor the second payment but of the debt which results from defendant having received double what was due to him'; and if necessary he would fall back on the rule of the Civil Law as to *causa*, holding that 'the cause for payment of the first sum was that it might be appropriated in discharge of the debt and so soon as the second sum was paid in execution, the first sum ceased to be a sum so appropriated'. Holloway, J. points out some of the difficulties in the way of this view. In *Goono Monee Dossee's case* [4], Mitter, J., relied alternatively on the ground of breach of contract or of fraud, but Couch, C.J., preferred to put it as a case of trust rather than damages (whether for breach of contract or for fraud); the decree-holder, he said, by taking out execution and obliging the debtor to pay again, became 'a trustee for the plaintiff of the money which had been previously paid'. *Shadi* v. *Ganga Sahai* [1], merely refers to the different views above adverted to. In *Viraraghava* v. *Subbakka* [5], Kindersley, J. seems to have thought that the theory of breach of contract could be relied on only where there was a distinct promise by the creditor to certify. In other cases, he would base the action on the decree-holder's fraud or negligence in not fulfilling the *duty* of certifying cast on him by the statute. He recognises (with Holloway, J.,) the difficulty of applying to such cases the ordinary count of 'money had and received upon a consideration which has failed'; for the consideration for the payment was the decree itself. The other Judges however relied on 'the breach of the implied promise to certify'

1. (1881) I. L. R 3 A. 538.
2. (1911) 21 M. L. J. 518.
3. (1866) 3 M H. C. R. 188.
4. (1870) 13 W. R. F. B. 69.
5. (1881) I. L. R. 5 M. 397.

(See also *Bairagulu* v. *Bapanna* [1]). *Sriramulu* v. *Dalayya* [2] throws no light on the question and Justice Subramania Aiyar in *Kalliani Anni's case* [3] evidently relies on the theory of the decree-holder's duty to certify and the breach thereof. In Bombay, Farran, J., did not look upon the trust theory with much favour. But he would not accept the 'breach of contract' theory either, because of the difficulty of 'implying a promise', the duty to certify being cast only by the law. Mr. Justice West evidently approved of the theory of 'failure of consideration' for the (first payment). In *Hanmant* v. *Subbabhat* [4] where the action was to recover the second payment, *i.e.*, the amount levied in execution, Farran (then) C. J. expressed himself ready to follow the view indicated in *Hukum Chand Oswal* v. *Taharunnessa Bibi* [5]; and according to the view taken in the latter case, the mere omission of the decree-holder to certify would not of itself constitute a failure of consideration or breach of contract in respect of the adjustment, but if the decree-holder executes the decree, the judgment-debtor would be entitled to recover 'the money realised in execution with such damages as he might have sustained by reason of the wrongful act of the creditor'. In *Marappa Chetti* v. *Shunmugappa Chetti* [6] it was observed that if the judgment-debtor sued to recover the amount originally paid (by way of adjustment) it must be on the footing of 'money paid on a consideration which has failed'—but the learned Judges had not to decide this question. Where, by reason of the omission to certifiy, the debtor is compelled to pay a second time (*i.e.*, in execution) his suit, they said, would be one to recover loss sustained by reason of the judgment creditor having failed to discharge the duty cast upon him by the law.' In a very recent case Seshagiri Iyer, J. held that the debtor was entitled to get back the amount levied by execution by way of damages *Raghava Aiyangar* v. *Athanambalam* [7].

The result of the above resume may now be shortly stated.

(i) The theory of the right to get back the amount first paid on foot of a trust or even on the ground of failure of consideration, has not found general acceptance. The force of Justice Holloway's argument that the original payment was rightly received at the time and that the entering up of satisfaction was at

1. (1892) I. L. R. 15 M 302.
2. (1905) 16 M. L. J. 54.
3. (1907) I. L. R. 30 M. 545
4. (1898) I. L. R. 23 B. 394.
5. (1889) I. L. R. 16 C. 504.
6. (1911) 21 M. L J. 518.
7. (1914) M. W. N. 174.

best only an expectation and not the *consideration* for the payment, cannot be denied.

(ii) The theory of a recovery by way of damages has been more generally recognised; but while some cases speak of it as damages for 'breach of contract' it is more frequently dealt with as a question rather of tort in the nature of fraud. With reference to the argument of 'breach of contract' it must be admitted, as pointed out by Kindersley, J. and Farran, J. that a *presumption or implication* of an agreement *to certify* may not be well-founded in fact, but a contract *not to put the decree into execution* may reasonably be implied from the private adjustment. It would accordingly follow that the mere *omission* of the decree-holder to certify can give the judgment-debtor no cause of action on this footing. Even as to the ground of 'tort,' while the cases rely on the breach of the 'statutory duty' to certify, no case has sustained an action on the mere ground of such breach, without more. It must also be remembered in this connection that there is no period *fixed by the law* within which the decree-holder is bound to certify. If, however, he goes further and puts in an application for execution, ignoring the prior adjustment or payment, that will amount to a breach of the contract not to execute or to a tort, in the sense of a fraudulent suppression of the prior adjustment which he was bound under the law to certify. And in this view, *that* would be the judgment-debtor's cause of action and not the subsequent realisation of the amount which is but the natural result of the execution, though this circumstance will have a material bearing on the question of the *quantum* of damages.

(iii) A third position is, however, possible and is hinted at in some of the cases, *viz.*, that the debtor has no reason to complain and therefore no right of suit, till he is made to pay a second time. There is something to be said in favour of this view also; for the execution proceedings may be dropped or may fail for so many reasons. And as for the vexation caused to the debtor by the mere initiation thereof, he has as much to thank himself, seeing that he could have prevented it by taking steps in time to have satisfaction entered up.

We are, however, unable to agree with the view suggested in *Marappa Chetti's case* [1], that there may be *two* different causes of action, at different stages.

1. (1911) 21 M. L. J. 818.

Coming now to the question of limitation, it is noteworthy that the point is singularly bare of authority, *Marappa Chetti* v. *Shunmugappa Chetti* [1], being so far as we are aware, the only reported decision on the point. In accordance with the views above summarised, as to the basis of the suit, the answer to the question of limitation will be as follows :—

i. (a) On the footing of trust suggested by Couch, C. J., the cause of action would seem to arise only on the *second* realisation, for he declines to found the claim on the mere failure to certify. The case cannot of course be brought under S. 10 of the Limitation Act; nor is it governed by Art. 62, there being nothing at the time of the *original receipt* to make it money received by the defendant for the plaintiff's use, see *Gurudas* v. *Ram Narain* [2]. Art. 120 must be invoked. (*b*) If the argument of failure of consideration is to be adopted, the case will of course fall under Art. 97; but it is by no means easy to say when the consideration fails. There is no basis for the assumption made in *Marappa Chetti* v. *Shunmugappa Chetti* [1] that limitation would commence to run on the expiry of 90 days from the date of the original payment; for as already observed, there is no time limit for the decree-holder to certify.

ii. If the suit is viewed as one for damages, the rule of limitation applicable will differ according as it is taken to be a claim for breach of contract or in respect of a tort. (*a*) If breach of contract, the further question arises, what is the contract? Where there is an express contract there is of course no difficulty; but what about the 'implied contract' referred to in the cases ? If we only imply a contract to certify, the cause of action under Art 115 must be held to arise on failure to certify *within a reasonable time* (cf. *Dorasinga* v. *Arunachalam* [3], *Gopala* v. *Ramasami* [4].) If, however, the contract to be implied is one not to execute the decree, it must be held to be broken by the presentation of an application for execution. It is difficult in this view to date the cause of action from the realisation of the decree amount in execution, for that is only a matter of 'damage arising from the breach' and is not the breach itself (cf. S. 24 of the Limitation Act) See also *Raghubar Rai* v. *Jaij Raj* [5]. Nor is it even possible to start limitation from the service on the judgment-

1. (1911) 21 M. L. J. 518.
2. (1884) I. L. R. 10 C 860.
3. (1899) I. L. R. 23 M. 441.
4. (1911) 22 M. L. J. 207.
5. (1912) I.L.R. 34 A. 429.

debtor of notice of the application for execution; for knowledge is no element under Art. 115. Questions may arise as to what is to happen if the decree-holder applies for execution, but allows the application to be dismissed before notice to the defendant, thus keeping him in ignorance of the breach till more than 3 years have elapsed from the first application for execution. It is difficult to found a cause of action on each *successive* application for execution and the hardship can be met only by the application of S. 18.

ii. If the claim is regarded as one in respect of a tort, fraud is generally assumed to be the basis of the right to relief and the case will therefore be governed by Art. 95; but even on this footing, it is not easy to see how the cause of action arises or limitation commences to run (as held in *Murappa Chetty* v. *Shunmugappa Chetty* [1]) from the time when the judgment-debtor is obliged to pay over again, as a result of the execution proceedings.

iii. It is only if the third of the views above indicated as to the basis of the action is accepted, that the realisation in execution will furnish the starting point for limitation; and Art. 62 will then be the proper article to apply.

SUMMARY OF ENGLISH CASES.

Fox *v.* **Jolly**: (1916) A. C. 1.

Landlord and Tenant—Forfeiture—Covenant to repair—Notice of breach—Notice bad as regards some breaches, good as regards others—Action in respect of latter good—Conveyancing Act.

Where a landlord gives notice of several breaches of covenant to repair in respect of each of which he is entitled to re-enter but the notice is defective in respect of some of the breaches, *held* that that does not prevent the landlord from re-entering for breaches in respect of which the notice is not defective.

Before the Conveyancing Act, the landlord was not bound before re-entering for breach of the covenant to repair, to give the tenant an opportunity to effect the needed repair but now under that Act, the landlord is bound to serve on the tenant a notice specifying the particular breach complained of and if the breach is capable of remedy, requiring the lessee to remedy the

1. (1911) 21 M. L. J. 518.

breach. It was contended in this case that not only are the breaches to be specified in the notice but also that the nature of the repairs necessary should be indicated. Their Lordships held that there was no such duty cast on the landlord. All that he has to do is to specify with reasonable particularity the breaches complained of.

Hammerton *v.* **Earl of Dysart**: (1916) A. C. 57.

Ferry — Right of — Scope of — Disturbance—New traffic —Declaration only.

This was an action for declaration that the plaintiff was entitled to an ancient ferry and for an injunction restraining the defendant from disturbing plaintiff in the enjoyment of it. Their Lordships held that upon on the facts there was no disturbance, the traffic served by the defendant being an entirely new and different traffic from that served by the plaintiff.

There is an interesting discussion in the case as to the exact scope of this right of ferry, the territorial limits within which ferrying by others can be restrained and the precise circumstances under which the right can be held to be disturbed. On the questions to what is the right basis of action in such cases there was some difference of opinion between the learned Law Lords that took part.

Their Lordships having held that there was no disturbance they refused to give a declaration of the plaintiff's right on the ground that it might be prejudging other cases.

The Roussuniar: (1916) A. C. 124.

Prize—Enemy cargo of oil on British ship—Shipped before war—Discharged after war into tank on shore—Liability to seizure and condemnation.

A cargo of petroleum oil owned by a German company was shipped at a neutral port on board a British vessel bound for Hamburg. While on its way, war broke out between England and Germany and the oil was discharged by the ship-owners into a tank on shore in England. It was subsequently condemned as a prize and the question was whether it was rightly condemned. Sir Samuel Evans and the Privy Council on appeal held that it was. The contentions on the other side were (i) the cargo being shipped on a British vessel before war broke out was not seizable as Prize (ii) that the oil not being captured while afloat on sea was

not subject to condemnation. Their Lordships held that neither of these circumstances was a bar to the seizure.

The Odessa : The Woolston : (1916) A. C. 145. (P. C.)

Prize Court—Cargo of enemy—Pledgee of goods—Right of—Not saved—Bounty of Crown—Not affected by legislation.

In this case, their Lordships agreeing with Sir Samuel Evans held that the Prize Court pays no regard to the rights of neutral or British pledgees of enemy cargo seized as prize. All that it has to consider is, who is the legal owner of the goods at the date of the seizure ? If an enemy-subject is the owner, they are condemned and the effect is to divest the enemy subject of his ownership as from the date of seizure and to transfer it to the Sovereign. The thing is then his (*i.e.*, the Sovereign's) to deal with as he thinks fit and none other has any right to it or its proceeds. The rule by which ownership and not any special right created by contracts or dealings between individuals is taken as the criterion of national character is not a mere rule of practice or convenience. It lays down a test of universal application, not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is and that it is not lost by the creation of a security upon the thing owned. If in each case, the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of every one who might claim to be directly or indirectly interested in the vessel or the goods seized and if in addition it had to investigate the particular facts of each case, the Court would be subject to a burden it could not well discharge. There is a further reason for the adoption of the rule. If special rights of property created by enemy-owner were recognised it would be easy for such owner to protect his own interest on the shipment of goods by borrowing upon the credit of such goods and if a neutral pledgee were allowed to use the Prize Court as obtaining a payment of his debts, that would practically be allowing the enemy a means of obtaining banking credit in neutral countries.

In special cases, the Crown of its bounty might make reparation to individual pledgees and this power of the Crown has not been taken away by any statute.

A. K. A. S. Jamal *v.* **Moolla Dawood, Sons & Co.**: (1912) A. C. 175.

Contract for sale of shares of Company—Breach by buyer—Measure of damages—Difference between market price and sale price at date of breach—Subsequent fall or rise in price, immaterial.

In a contract for the sale of shares of a company the measure of damages upon a breach by the buyer is the difference between the market price of the shares at the date of the breach and the sale price with an obligation on the seller to mitigate the damages by getting the best price he can upon that date. If the seller retains the shares after that date, he cannot recover from the buyer the loss due to subsequent fall in the market nor is he bound to account for the profit earned by a rise in the market.

In re **Backhouse Salemon** *v* **Backhouse,** (1916) 1 Ch. 65.

Will—Construction—Legacies, original and additional or substituted—Conditions and incidents of—Rule—Applicability to cases where substituted legatee different from original legatee.

Any inference that an additional legacy is to be on the same terms as an original legacy is an inference that yields to and is displaced by any express language to the contrary.

The general rule of construction that a substituted legacy is *prima facie* payable out of the same funds and is subject to the same incidents and conditions as the original legacy applies also to cases where the legatee under the substituted gift is a different person from the original legatee.

Watkins *v.* **Bottell.** (1916) 1 K. B. 10.

Carrier—Common carrier—Private carrier—Distinction—Person exercising public employment if liable as common carrier—Furniture remover—Liability of—Extent.

The point for decision in this case was whether the defendant, although admittedly not a common carrier, had in relation to the plaintiff's goods undertaken the liability of a common carrier and was liable for the loss of the goods owing to a fire that broke out among them while they were in course of carriage on the defendant's lorry. The facts found were: that the defendant was an ordinary remover of household furniture; that the plaintiff applied to him to remove his furniture from one place to another ;

that the defendant before undertaking the work inspected the furniture and having done so agreed to remove it for a certain sum; and that there was no other express term in the contract. *Held*, that there was no evidence that the defendant undertook the liability of a common carrier.

Quaere.—1. Whether there is a class of persons who, without being common carriers, are under the liability of common carriers, namely, persons who exercise a public employment of carrying goods for hire.

Per Rowlatt, J.—2. Whether the doctrine that a person, who is not in fact a common carrier, can be a common carrier, is applicable to carriers by land.

Distinction between "common carriers" and "private carriers" pointed out.

London and Northern Estates Co. v. Schlesinga (1916) 1 K. B. 20.

Contract—Performance—Impossibility—What amounts to—Tenancy of house—Condition against assignment or under-letting without landlord's consent which cannot be reasonably withheld—Tenant prohibited by law from residing in District—Effect on his liability for rent.

The defendant was an Austrian subject. Before the outbreak of the war the plaintiffs let to the defendant a house for a term of 3 years from 1914. The agreement provided that the defendant was not to assign or under-let the house without first obtaining the consent of the landlords which should not be unreasonably withheld. After the outbreak of the war an Order in Council was made which prohibited alien enemies, of whom the defendant was one, from residing within specified areas covering the suit house. In a suit for rent for the period subsequent to the date of the Order in Council, the defendant pleaded non-liability on the ground that the agreement between the parties was that he should reside in the house and that the order had rendered the performance of that agreement impossible.

Held, that the personal residence of the defendant was not the foundation of the contract and that the fact that his personal residence was prohibited by the order did not make the performance of the contract impossible.

Hoole Urban District Council *v.* Fidelity and Deposit Company of Maryland. (1916), 1 K. B. 25.

Surety-Bond—Construction—Bond for due performance of contract—Litigation between the parties to contract—Judgment against contractor for costs—Liability of surety.

As a rule when costs are to be paid as the result of an action or of proceedings before an arbitrator they fall to be paid by reason of the Judgment given in the action or of the arbitrator's award, and not by reason of any stipulation in the contract out of which the dispute arose which formed the subject-matter of the action or reference.

Where the defendants stood surety to the plaintiffs for a person, who entered into a contract with them for the execution of certain works, and gave a bond to the plaintiffs conditioned for the due performance by the contractor of his contract, *held*, in an action by the plaintiffs against the defendants for the recovery of the costs decreed to the plaintiffs in a litigation between them and the contractor as to the performance of the contract, that the defendants were not liable as the liability of the contractor arose not under his contract but under the Judgment.

Crane *v.* South Suburban Gas Co. (1916) 1 K. B. 33.

Highway—Nuisance—Negligence—Dangerous thing placed on or near highway—Liability of person placing—Nature and extent—Injury to innocent party—Effect.

A person doing something on a highway or on land adjacent to it, which he may lawfully do if he takes proper precautions to guard the public from injury, is guilty in law of a nuisance if he fails to take proper steps. Where therefore a dangerous thing is placed on or near a highway and a passer-by accidentally knocks against it, thereby causing injury to another, the person who placed the thing there is the effective cause of the injury, if he ought to have foreseen that the result of placing it there would be to endanger persons lawfully using the highway, and is liable to the injured party. The question of a trap has nothing to do with such a case, because the necessity of considering it only arises where the person who is said to have created it gave a licence or invitation to others to enter the premises where the alleged trap existed.

Bank of Australia v. Clan Line Steamers, Limited: (1916) 1. K. B. 39 C. A.

Bill of Lading—Construction—Provision for possible transhipment of goods—Contract of liability for unseaworthiness—Provision for time within which claims for damages should be made. Unseaworthiness of ship—Loss due to—Claims in respect of—Applicability of time limit—Transhipment of goods to another vessel—Claim in respect of goods transhipped—Time limit if applies to. Observations on express and implied contracts and effect of express contract regarding matters with respect to which law implies contract.

The action was by the indorsees of a bill of lading against the shipowner for breach of contract and for damages for injury to the goods carried by the ship. Clauses of the bill of lading material for the decision of the case were Clause 3 which provided for possible transhipment of the goods, Cl. 12 which provided that "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of *steamer's arrival* there" and Cl. 14 which provided that "The shipowners shall be responsible for loss or damage arising from any unseaworthiness of the vessel when she sails on the voyage." The goods were shipped at Wellington upon a ship called the "Clan Maclaren." She sailed to Port Pirie where she transhipped some of the goods into a ship called the "Geelong." The goods on board both the vessels were damaged by unseaworthiness. No claim was made by the plaintiffs upon the defendants till more than seven days after the arrival of either vessel. The questions for decision were (1) whether Cl. 14 contained an express contract as to unseaworthiness and, if so, the limitation of time provided for by Cl. 12 applied and (2) what was the true meaning of Cl. 12 *i.e.* whether the limitation of time fixed by it applied to claims in respect of goods shipped on board the "Clan Maclaren" only or the "Geelong" also. *Held* that (1) Cl. 15 provided for an express contract as to unseaworthiness and Cl.12 applied and(2)by Pickford, and Bankes L. JJ. (Buckley L.J. dissenting) that the limitation of time fixed by Cl. 12 applied to claims in respect of goods shipped on board the "Clan Maclaren" only inasmuch as the clause was not clear and unambiguous.

Observations on express and implied contracts and the effect of express contracts regarding matters with respect to which the law implies contracts.

If a shipman puts in a clause which he intends for his protection, and which is ambiguous and not clear, then it does not operate to protect him.

Jefferson v. Paskell (1916) 1 K. B. 57 (C. A).

*Marriage—Breach of promise—Action for—Plea of illness of plaintiff at date of intended marriage—Proof—*Onus*—Plea of defendant's honest belief of her unfitness — Sustainability—Illness of plaintiff if justifies breach by defendant—Jury—Misdirection—What amounts to.*

Where, in an action for breach of promise of marriage, the defendant raises the plea that at the date of the intended marriage the plaintiff was so ill from the disease of tuburculosis that she was not able to be married, the burden is in the first instance upon the plaintiff to prove that she was ready, in the sense of being in a state of bodily fitness, at the date of the marriage or within a reasonable time thereafter. But very slight evidence is sufficient to discharge that *onus* such as that she was in a good state of health within a short time after the fixed date. The burden then is on the defendant to prove that she was suffering from tuberculosis. The fact that the defendant honestly and on reasonable grounds believed that the plaintiff was unfit, though it might affect the amount of damages, would not affect the plaintiff's right to recover, not being a defence in law, if the plaintiff was as a matter of fact not unfit.

Per Phillimore, L.J.—Quære: Whether the plaintiff's ill-health is not a justification for refusal to perform the promise to marry.

Per Pickford, L. J. The Judge is entitled to give the jury his views of the evidence and is not obliged to detail to them every part of it, or every view which each party wishes them to take, so long as he does not mislead them as to the matters they have to consider, or the evidence in the light of which they must consider them.

JOTTINGS AND CUTTINGS.

The Arrest of the Consuls at Salonica:—The recent arrest and placing under guard of certain enemy consuls by the Allied military authorities at Salonica raises questions of international law of great nicety and importance. To say that there is no precedent by which this act may be tested is of little assistance, for the present relation between Greece and the Allies is in itself entirely *sui generis*. As between the Allies and the enemy States whose consuls were arrested there is no question of violation of right. The act was one arising out of the exigencies of the military situation, and there is no exemption from arrest of any diplomatic officer of an enemy State in such cases; he may, by virtue of his office alone, be made a prisoner, as is laid down in the Manual of Military Law, which correctly states the conclusions of writers on international law on the point. The material question is that of Greek territorial sovereignty—a point already taken by the Greek Government in its protest to the Allied Powers. But in addition to this territorial sovereignty, and superimposed upon it, is the right of the Powers whose army of occupation has, by acquiescence, been allowed to establish itself there, to take all measures for their safety which are incidental to the occupation. A neutral state has, of course, a *prima facie* right to preserve its machinery for diplomatic intercourse with both sets of belligerents unimpeded. But even this right may have to yield before the needs of war. The same principle was involved in the dispute between Prussia and the United States in 1871, when the Prussian military authorities refused to allow the United States Minister in Paris to send despatches to London unless the bag containing them was left unsealed. The State Department entered a protest; but in the opinion of Hall (International Law, pp. 311-313) there was much to be said for the Prussian claim. And this was in some ways a stronger assertion of the belligerent's right than the present, for the person interfered, with was a diplomatic envoy, while at Salonica consuls only were arrested. This is a distinction of some importance, since the consul possesses in general none of that large immunity with which the diplomatic envoy is invested as embodying the majesty of his State. He has no rights of exterritoriality, nor of independence of the civil and criminal law of the country to which he is accredited From the point of view

of the State to which he is accredited, he is not so sacrosanct a person as the envoy, nor as necessary to the maintenance of intercourse between the central State and the belligerents. Whichever way, therefore, the question be viewed, whether as an interference by belligerents with neutral intercourse or as an act of sovereignty on Greek soil, the protest against it would not seem to be well-founded. The first may be justified on the ground of the superior claims of the belligerents; the second, on the ground that, the Allied armies being *de facto* planted on Greek territory, the acquiescence of the local sovereign must carry with it an implied right to do all things reasonably necessary to their safety.—*The Law Journal, 15th January, 1916.*

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Miscellany:—A lady who described herself as 'Lady Eliza Rose,' and who was wearing a barrister's wig and gown, appeared in Mr. Justice Neville's Court on Tuesday morning and said that she wished to make an application to his Lordship. Mr. Justice Neville: Are you a member of the Bar? The applicant: I am a barrister and I am not. I obtained judgment from Mr. Justice Joyce and I now desire to take the matter to the King's Bench Division. Mr. Justice Neville: You are not a member of the English Bar, and in these Courts the garb that you are wearing is reserved for those who have been called to the Bar by one of the Inns of Court. I cannot allow you to masquerade here in a costume which you are not entitled to wear. The applicant: I am a barrister here in my own cause and I had the permission of Mr. Justice Joyce to go into any Court I like. Mr. Justice Neville: I decline to hear you in that costume and I order you to leave the Court. The lady then gathered together the documents which she had brought with her and left the Court.—*Ibid.*

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A Lawyer-Viceroy.—English lawyers can afford to disregard the guerulous attacks being made in certain quarters upon their calling while they see members of their profession appointed to some of the highest positions in the State with the unmistakable approval of the public. They can claim even the new Viceroy of India as one of their calling. Not only is Lord Chelmsford the grandson of a Lord Chancellor; he is himself a member of the Bar, having been called at the Inner Temple in 1893. Constitutional questions of the greatest importance will arise in India in

the immediate future, and it is fortunate that the new Governor-General possesses, by virtue of his legal training, a special qualification for dealing with them.—*The Law Journal, 22nd January 1916.*

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The Appellate Courts:—The work of both the House of Lords and the Judicial Committee is being notably affected by the war. In the latest House of Lords' list only seven appeals are entered, of which four are from England and three from Scotland. The number of Colonial appeals in the Judicial Committee's list is even smaller. Only four stand for hearing, British Columbia, Seychelles, Mauritius, and the Straits Settlements being the four Colonies from which they come. Neither Australia nor New Zealand supplies a single case, nor does South Africa. But, although the number of Colonial appeals is unprecedentedly small, the Judicial Committee's list is not shorter than usual. The number of Indian appeals, so far from being reduced by the war, has become larger; as many as twenty-one are entered. This increase in the Indian work of the Committee is an additional reason for welcoming the appointment of Sir Lawrence Jenkins, until recently Chief Justice of Bengal, to a seat in the Court in Downing Street. Two distinguished Indian jurists who had rendered much valuable service on the Committee have recently passed away. Both Sir Arthur Wilson and Sir Andrew Scoble, however, had long ceased to take an active part in the work of the Court, and, though, thanks to the changes introduced by Lord Haldane, the constitution of the Judicial Committee was never stronger than it is to-day, there was obvious need for the services of another distinguished lawyer experienced in the administration of Indian law.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

A writer in the Juridical Review for October tries to give some idea of Lord Coke as a person. It is curious that the great lawyer was in his own actions at times wilful and whimsical, and even broke the ordinary rules of law. In his hurry to get married to Lady Hatton lest his rival Bacon should be beforehand with him he had the ceremony performed in a private house and at the wrong time instead of at the Parish Church between eight and twelve in the forenoon with the result that he was prosecuted and

had to make most abject submission before he was pardoned. He had the common failing of the lawyer, the overmastering desire to win a weak case. Having once taken up a point or become engaged in a case, he believed in it heart and soul and was ready to resort to every device to bolster it up. Though his sense of propriety in certain directions was wrong, he had a high conception of his duty and he carried it out without fear or favour. It is to this respect for the law and his courage in giving effect to it, exhibited in the wider field of constitutional politics that he owes the respect with which after every just detraction, later times have regarded him. He wished to stand well with the powers, also had a keen regard for his interest yet he would not go beyond a certain distance. He was at his books from early morning till night. His learning was admired even by Lord Bacon, rival as he was. Coke on the whole had a fortunate life. He was strong and active in body. When quite an old man and somewhat ailing he was moved to declare that he had never taken physic and that he was not going to begin it then. He accepted the current beliefs of the day. Along with Bacon and Shakespeare he believed in astrology and witchcraft. He was somewhat of a Puritan and considered play-acting as a kind of vagrancy to be suppressed by the stocks and the scourge.

Limitation of liability under contracts is another article of interest in the same Journal. When a person enters into a contract he may lawfully limit his liability thereunder provided the limitation is clearly and expressly mentioned. This limitation may take various forms. One important form of limitation is that only certain property shall be liable. Again it may be stipulated that a sum of money shall be payable only out of certain funds; the existence or sufficiency of the funds may be a condition precedent to the liability or the whole contract may be contingent on the existence of the fund, or the promisor may be personally liable while the funds are in his possession or under his contract—the liability being limited however to the extent of the funds. Again certain property may be charged with the payment of money with no personal liability whatever in the person charging. Another way of limiting the liability is to make it enure only so long as a person fills a particular capacity. The mere fact that a person is a trustee, an executor, an administrator, a manager or a receiver is not sufficient to limit the liability.

Even a contract "as trustee, manager or receiver" is insufficient. The words which purport to limit the liability must not be repugnant to or inconsistent with the words which impose the liability. The rule that the words of a covenant ought to be taken most strongly against the covenantor would require any limitation on the liability *prima facie* imposed by the words of the covenant to be clearly made out.

Another article in the same Journal contains a discussion as to the law of negligence in its application to children. It is well settled that the mere fact of being the owner of a subject from which damage arises does not of itself impose liability for the damage; one is entitled to rely on the protection of one's own ground against those who have no right to be there. Children therefore, who are trespassers though unable to appreciate the risks they run are, as regards the liability of owners of private ground in the same position as adults who, as trespassers take the risk of their trespass. But of this general rule there are qualifications. If the plaintiff can show actual fault on the defendant's side such as proceeding to shunt, though knowing that a child is on the line, or placing something in the nature of a 'trap' to children, that will be a ground of liability. What actually constitutes a trap is a difficult question but, before anything can be called a trap, it must be shown not only to be a danger but a concealed danger known to the owner and not known to the injured person, or in the case of a child beyond its capacity of appreciation. A thing is not a trap when not dangerous till tampered with but on the other hand everything must be secure enough to stand the risks to which it may be open in the particular place where it happens to be. Where for instance a ground is adjacent to a public road, the owner is not entitled to carry out dangerous operations on his ground in the immediate neighbourhood of the road without taking precautions for the safety of those who go there; for though he is entirely within his rights in what he is doing and anyone on the ground is a trespasser, yet the fact of its being near the public way constitutes, as it were, a sort of presumptive invitation to stray off the road which it is the duty of the owner to rebut by erecting notice boards, etc, Lord M'Laren considered such obligation to arise from the law of neighbourhood. The position of people who are on the land upon invitation is higher and they are entitled to

reasonable protection from danger. Though ordinarily, where the defendants are acting within their rights and reasonable protection for public safety is taken, no liability attaches, there is a special duty where the place is frequented by children to render it harmless to them. Drivers of vehicles are bound to bear in mind the disposition of children to get in the way of carriages and take the necessary precautions. Tram cars are shown some more concession in this matter as it is not as easy to regulate their movement, as that of the ordinary vehicles. There has been some discussion and some difference of opinion in Scotch Courts as to whether the doctrine of contributory negligence is applicable to children. The prevailing opinion seems to be that the capacity to neglect is as much a question of fact in any individual case as negligence itself. If the child is capable of taking care of itself that is a case of contributory negligence. If it is not, there is no contributory negligence. Where there is no special duty owed to children, the fact that they are injured would not make one liable, for it is then the duty of the parents to take care of them.

A writer in the "American Law Review" (November-December) tries to analyse the causes for Democracy coming to be impatient with the law. He warns lawyers that unless they live up to professional standards higher than ever set before, they must be prepared for more and more of meddling and officious supervision by the ignorant Demos.

"The Law" said Lord Haldane "is a calling notable for the individualities it has produced". Lord Cairns according to a writer in the same Review, is one that has made the legal profession notable. Viscount Brice calls him "unquestionably the greatest judge of the Victorian Epoch". Mr. Benjamin pronounced him the greatest judge before whom he had ever argued a case. At the same time in the words of Lord Halsbury "he was equally great as a statesman, as a lawyer and as a legislator." Disraeli rated his political services very high and called his speech as Attorney-General one of the greatest speeches ever delivered in Parliament. The Judicature Act owes most to him. The Conveyancing Act, the Married Women's Property Act and many other acts also are in a large measure his work.

Another writer describes the state of the law as to religious meetings in America. In England the meetings of dissenting churches have but grudgingly been protected from disturbance by

Toleration statutes while the meetings of the Established Church have always enjoyed the protection of Common Law. As there is no Established Church in America all churches are equally regarded and their meetings are protected by the Common Law, as well as by the statutes. Their meetings are protected not only while the services are being carried on but a reasonable time before and after. The statutory minimum of a meeting is a single member. To be punishable, the disturbance must be wilful that is to say the intent must be evil; it need not be an intent to disturb the meeting. Under certain statutes, even sweetmeat vendors and hawkers are not permitted within a radius of sometimes one or two miles of the religious meetings. What acts will disturb a meeting, must depend upon the circumstances of each case.

Mr. E. A. Adler writing in the *Harward Law Review* deplores the general failure of lawyers to recognise the true relation of *labour, capital* and *business* as between themselves and with reference to society. The community has the right to insist on law and order in industry no less than outside of it. Industrial order can come only when means are provided by which all the grievances based on a just conception of communal interest which are now left to settle themselves outside the pale of the law may be disposed of within it. The Common Law viewed the subject in its proper perspective and insisted on each man exercising his calling "rightly and truly as he ought" and "to serve the public as far as the employment extends". Under that regime, if the landlord had his rights, so had the serf. If the owner of the mill had his rights, so had the public to see that he maintained proper machinery and that he did his work properly and promptly. That the members of the community have no interest in how profits from community services shall be divided, no right to participate in the rendering of that service, no control of the time, manner and conditions under which that service shall be performed, are purely modern ideas.

In another article the question as to how far clauses in pledge agreements relaxing the common law restrictions on pledgee's action are valid is discussed. As a general rule, such agreements are enforceable to the extent they fairly facilitate the collection of the creditor's due. When however they provide for forfeiture of the security, they are like all other agreements for a penalty invalid

on grounds of public policy; even when upheld, they are regarded by courts with suspicion and dislike. A strict construction is put on them and a waiver of the right to proceed according to the letter is readily inferred. In addittion to it, the Court insists always on the strictest good faith in the performance of these agreements and a pledgee will never be permitted to shelter himself behind a bare compliance with the powers conferred.

BOOK REVIEWS.

THE INDIAN DECISIONS (NEW SERIES) *by the Lawyer's Companion Office. Bengal Law Reports Vol. II. Price Rs. 7. Law Printing House, Madras.*

We note with pleasure the expeditious way in which the publishers are bringing out these series. The present volume is the reprint of the 3rd and the 4th volumes of the Bengal Law Reports.

THE TRANSFER OF PROPERTY ACT AND EASEMENTS ACT *by Mr. T. R. Desai, Vakil, High Court, Bombay.*

To have gone through five editions is some guarantee as to the usefulness of the book. We are glad to vouch that in fact it is a useful publication. Not confusingly over-burdened with matter, the commentaries are yet sufficiently full and comprehensive to enable the student to get an intelligent grasp of the principles of these Acts. The cases are up to-date and carefully selected. There are 8 appendices to the book; one of them gives a summary of the Act; another gives the leading English cases and a third deals with important maxims and so forth. These are likely to be appreciated by students. The clear analysis of case law by the author is likely to benefit even practitioners. The book is certainly cheap for the matter it contains.

BOOK REVIEWS.

LAND TENURES IN THE MADRAS PRESIDENCY *by S. Sundararaja Aiyangar B. A., B. L., High Court Vakil. Modern Printing Works, Mount Road : Price, Rs. 10.*

A treatise dealing adequately with South Indian land tenures has long been a *desideratum*. On account of the very largeness of the area covered by Baden Powell's book, the treatment given to these has been necessarily meagre and one had to cast about for information in a variety of quarters such as District Manuals, Fifth Report, Board's Standing Orders, Wilson's Glossary Maclean's Manual, Mirasi Papers, Madras Code, the Law Reports, *et hoc genus omne*, with no assurance even then that all the available information has been gathered. To have put together all the detached items of information and presented a lucid and accurate description of the infinite variety of tenures prevailing in this Presidency (every District, every Taluk for the matter of that seems to have some peculiar tenure or other) is a service for which the profession as well as the student should be deeply grateful to the author. The book consists of 14 chapters. The first and second chapters deal with the conception of property as it prevailed at different times. For instance, the author examines the basis for the theory of State ownership of land which once had the vogue but has since been given up even by the State. He shows conclusively that that theory is in accord neither with the immemorial practice of this country nor with the approved doctrines of Hindu and Mahomedan Law. In the succeeding chapters, the author takes up the various types of property more or less in the order of their content. In chapters III, IV and V he deals with the Mirasi, Ryotwari and Zamindari tenures ; Chapter VI to IX, deal with beneficial tenures known comprehensively as Inams. The tenures governed by the Estates Land Act are dealt with in Chapter X. Chapters XI and XII deal with the ordinary leasehold and other interests. Some of these tenures are quite as valuable as and hardly distinguishable from occupancy tenures (cf. the Mulgeni tenure of Canara, or the Saswatom of Malabar). The tenures of Malabar are given a separate chapter for themselves. This is in accordance with the conventional view as to these tenures being a genus apart. In the last chapter the remedies of the State for the recovery of arrears of revenue and other kindred subjects are dealt with. From this brief summary, one must be able to judge the comprehensive nature of the treatise. But without by any means, detracting from the

merits of the other chapters of the work which are carefully compiled and contain very valuable and accurate information (cf. for instance, the chapter on Malabar Tenures in which more detailed information is given about them than in any single book that we are aware of), the chapters on Inams are a special feature of the book and are particularly valuable. As for these Inams, their names are a legion and the objects for which they are given are hardly less numerous. There are inams of both revenue and land, and inams of revenue alone; of the latter there are inams of half revenue, quarter revenue, and three-quarter revenue, subject to jodi and not subject to jodi, subject to money jodi and jodi in kind. Again there are major inams and minor inams, pre-setlement inams and post settlement inams, inams for private service, and inams for public service. There are secular grants and there are religious grants and there are grants for village service. There are grants to Brahmans, non-Brahmans and to Mahomedans. All these various kinds of tenures are known by distinctive names, and according to the locality where they are found and the language that is prevalent there. Their incidents also differ. In some cases, the grantor has the right to resume. In others he has not. The nice line that separates a grant burdened with service from a grant of an office which is remunerated by the use of the land has been the subject of consideration in numerous cases. Then there are the complications introduced by the Pensions Act. All these subjects have been dealt with by the author in great detail, setting forth in fact all the available information, to the credit of the author it must also be said, very clearly and with no verbiage of any sort. The chapter on the Estates Land Act is an admirable summary of the Act as interpreted in judicial decisions which are exhaustively noted at the foot. While dealing with the Mirasi tenure, the author gives a clear account of the village system as it obtains in Southern India with its many local varieties. The work besides exhibiting very considerable research, is remarkable for clearness of arrangement and lucidity of exposition. The important acts that bear on the subject are printed as an Appendix. An exhaustive glossary of the terms used in South India is also given. The index which seems to be very carefully prepared also deserves special mention as it is a thing which cannot be said of many Indian publications. On the whole we have no hesitation in recommending the book to the public and venture to hope that it will soon be recognised as a reliable text book on the subject it deals with.